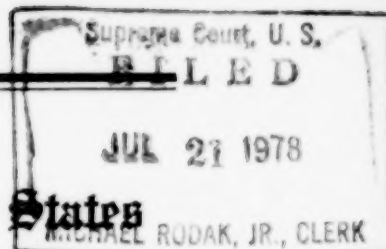

IN THE
Supreme Court of the United States
OCTOBER TERM 1977



No. 77-1775

RENTAR INDUSTRIAL DEVELOPMENT CORP., RENTAR INDUSTRIAL DEVELOPMENT ASSOCIATES, VERTICAL INDUSTRIAL PARK ASSOCIATES, ARTHUR RATNER, DENNIS RATNER and MARVIN RATNER,

Appellants,

against

CARL A. MORSE, INC. (Diesel Construction, a division), individually and on behalf of trust beneficiaries of funds accruing for the construction of an improvement of real property at Tax Block, Lot 1, Queens, New York and ATTORNEY GENERAL OF THE STATE OF NEW YORK, Pro Se,

Appellees.

**MOTION OF ATTORNEY GENERAL TO DISMISS
OR AFFIRM**

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**MOTION OF ATTORNEY GENERAL TO DISMISS
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Louis J. Lefkowitz, Attorney General of the State of New York, appearing herein below, pursuant to New York Executive Law § 71 in support of constitutionality, moves pursuant to Rule 16 of the Revised Rules of this Court that this appeal be dismissed for want of a substantial federal question, or that the judgment below be affirmed.

Opinions Below

The opinion of the Court of Appeals of the State of New York is at 43 N Y 2d 952, 375 N.E. 2d 409, 404 N.Y.S. 2d 343, and is reproduced as Appendix A of Appellants' Juris-

dictional Statement. The opinion of the Appellate Division of the Supreme Court is at 56 A D 2d 30, 391 N.Y.S. 2d 424. The opinion of Special Term, Supreme Court, Queens County is at 85 Misc 2d 304, 379 N.Y.S. 2d 994.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

Statute Involved

New York Lien Law, Art. 2 (§§ 3, 4, 9, 10, 11, 12-a, 17, 19, 20, 23, 34, 37, 38, 39 and 39-a) which is set forth at Appendix C of the Jurisdictional Statement.

Question Presented

Does the Court of Appeals' conclusion that the New York mechanics lien is constitutional raise a substantial federal question?

Facts and Prior Proceedings

Appellee Carl A. Morse, Inc. served a summons and complaint seeking to enforce its mechanics liens filed on appellants' Rentar property. These liens were filed in the Supreme Court, Queens County, after Rentar and Morse entered into a contract for Morse to build a building as "contractor" and "agent". Thus Morse filed the liens in excess of \$1,000,000 for work, labor and services rendered. When a payment dispute arose, Morse started the instant action. At Special Term, Rentar moved for summary judgment on two grounds (1) Morse did not have a valid lien as it was an agent and (2) the Lien Law was unconstitutional. As to the constitutional issue, Special Term rejected same, and as to the non-constitutional issue, "agent" status, found a triable issue of fact.

The Appellate Division was in "complete agreement" and affirmed (391 N.Y.S. 2d at 426). There was a dissent. On motion, it granted leave to appeal (March 14, 1977). The Court of Appeals affirmed on the opinion of the Appellate Division (J.S. 1a).

ARGUMENT

No substantial federal question is present on this appeal as the mechanic's lien does not deprive one of possession of property and due process does not require a prior hearing.

There can be little doubt that the mere filing of a mechanic's lien does not deprive the owner of real estate property without due process of law. While, as the Appellate Division said, 391 N.Y.S. 2d at 429, and affirmed by the Court of Appeals, the lien may create a "cloud" on title, "the fact remains that the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with the property as he chooses . . ." Thus, we submit, that no substantial federal question exists here. A prior hearing is not required. This Court did not find one herein when it affirmed *Speilman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), aff. 417 U.S. 901. Filing of a mechanic's lien does not result in the deprivation of any "significant property interest". This has been the uniform finding and result in the federal courts. See *Ruocco v. Brinker*, 380 F. Supp. 432, 436 (D.C. Fla. 1974, three-judge court); *Cook v. Carlson*, 364 F. Supp. 24 (D. S.D. 1973); and *Brook Hollow Assoc. v. J.E. Greene, Inc.*, 389 F. Supp. 1322 (D. Conn. 1975).*

Clearly, mechanic's lien serve a valuable function—(1) provide construction contractors with security and (2)

* There are contrary sister state court decisions, but they are not relevant as the laws are different in wording.

gives notice to subsequent purchasers of a charge on the property. As the Court of Appeals noted (J.S. 1a) one must not confuse "a lien on property which does not dispossess with the cases in this Court involving dispossession by seizure."

Of course even here we have a contract between knowledgeable businessmen and *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) should bar any due process claim. In addition, there is doubtful "state action", a requisite of a due process claim. No government official is involved as to the lien. See *Flagg Brothers, Inc. v. Brooks*, — U.S. —, 56 L. Ed. 2d 185, 194 (1978).

CONCLUSION

The motion to dismiss or affirm should be granted.

Dated: New York, New York
July 17, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Appellee Pro Se pursuant to
Executive Law § 71*

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